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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. MARKELLE NEAL TAYLOR, Defendant and Appellant.	C042165 (Super. Ct. No. 01F06463)

APPEAL from a judgment of the Superior Court of Sacramento County, Jack V. Sapunor, J. Affirmed as modified.

Scott Concklin, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Jo Graves, Assistant Attorneys General, J. Robert Jibson and Jesse Witt, Deputy Attorneys General for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts IV, V, VII, and IX of the DISCUSSION.

On August 9, 2001, defendant Markelle Neal Taylor punched his girlfriend, Garvon White, six times hard in the stomach when White was seven months pregnant with defendant's child.

On the same day, the child, Marcel Taylor, was delivered by Caesarean section surgery and was born alive. However, the baby died about a month later from necrotizing intercolitis; the baby's small bowel was almost entirely dead.

A jury convicted defendant of the second degree murder of Marcel Taylor, a human being (count 1; Pen. Code, § 187, subd. (a); undesignated section references are to the Penal Code) and the infliction of corporal injury resulting in a traumatic condition on Garvon White (count 2; § 273.5, subd. (a)). The jury found as to count 2 that defendant personally inflicted great bodily injury upon White under circumstances involving domestic violence (§ 12022.7, subd. (e)), and that with intent to injure and without consent defendant personally inflicted injury upon White, whom he knew or should have known was pregnant, and the injury resulted in the termination of the pregnancy (§ 12022.9, former subd. (a); see fn. 10, *ante*).

Sentenced to 15 years to life in state prison, defendant contends: (1) Defendant could not properly be convicted of the murder of a human being based on an act that occurred before the human being came into existence. (2) The trial court erred by defining implied malice in terms of a conscious disregard for "human life," rather than "fetal life." (3) There was insufficient evidence to convict defendant on count 1: because the victim died of natural causes, defendant was not the legal

or proximate cause of his death. (4) The trial court should have instructed the jury sua sponte on the People's burden of proving proximate cause. (5) The trial court committed reversible error under *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*). (6) The trial court erred by failing to instruct sua sponte on attempted murder of a fetus as a lesser included offense to murder. (7) The trial court erred by instructing the jury pursuant to CALJIC No. 8.51 that if a person causes another's death, while committing a felony that is dangerous to human life, the crime is murder. (8) The evidence did not support the jury's finding that defendant terminated Garvon White's pregnancy. (9) The prosecutor committed prejudicial misconduct by violating a court order. (10) The trial court erred in sentencing by failing to award defendant presentence custody credits.

In an unpublished portion of the opinion, we consider and reject contentions (4), (5), (7), and (9). In the published portion, we consider and reject defendant's remaining contentions. We shall therefore affirm the judgment, but shall award defendant the custody credits to which he is entitled and direct the trial court to prepare a corrected abstract of judgment reflecting the award of credits.

FACTUAL AND PROCEDURAL BACKGROUND

In August 2001 defendant lived with Garvon White in Sacramento.[1] White was seven months pregnant with defendant's child.

On August 9, White and defendant argued. She told him he could pack his things and leave. He got angry and punched her in the head. White said she would do what the mother of his other children had done--take his baby and leave so he could not see it. She knew this would anger him.

Defendant punched White twice in the stomach, knocking her down. He kept on hitting her while she was on the floor as he spoke to his brother on the telephone. Looking sweaty and crazed, he yelled: "I don't want this baby." "I don't want this bitch to have my baby." He hit her six times in the stomach altogether.[2]

White felt a knot in her stomach and became frightened. Defendant said he was afraid he had killed or hurt the baby. He

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[1] All further dates are in 2001 unless otherwise stated.

[2] At trial, White testified that she could not recall telling the police defendant had hit her six times and claimed she had exaggerated the severity of the assault out of anger. Before trial she had falsely told a defense investigator that another woman punched her in the stomach, not defendant.

White was an extremely reluctant witness who testified in custody after evading subpoena and being brought in on a bench warrant. Although she told a story generally in line with her prior statements (aside from that given to the defense investigator), she minimized defendant's actions as far as possible and portrayed herself as habitually violent toward defendant and others.

later said to a neighbor that he had screwed up and did not want to be charged with murder if the baby died.

White walked across the street to a fire station. A paramedic, after interviewing her, had her transported by ambulance to the hospital where Dr. Derek Wong, White's obstetrician/gynecologist, was on duty. Dr. Wong had cared for White during her pregnancy, which had been uncomplicated up to then, with a delivery due date of October 31.

White told Dr. Wong defendant had hit her five or six times in the stomach and she was cramping. Dr. Wong found significant bruising. After performing a maternal blood test, a fetal heart rate check, and an ultrasound examination, he decided to perform an immediate Caesarean section surgery (C-section). He suspected internal bleeding from a placental abruption, or premature separation of the placenta from the uterine wall, which could kill the fetus from ongoing blood loss.

On performing the C-section, Dr. Wong discovered a placental abruption which had produced blood inside the amniotic fluid and a large blood clot. The beating White had described could cause such an injury. There was no evidence that anything else had caused it.

When delivered by C-section on August 9, the baby (named Marcel) was just over 28 weeks old and weighed less than three pounds. Although 80 to 90 percent of babies born that prematurely survive, there are always complications, and such a baby needs months of care to be able to live outside the nursery.

Marcel also had Down's syndrome, including a heart defect normally repairable by surgery. His premature birth did not cause these conditions, but it made them harder to treat.

Dr. Faisal Ezzedeen, a neonatologist, put Marcel on life-support systems, then began treating him for the problems caused by his heart defect and by the immaturity of his lungs and gastrointestinal tract.

One risk caused by prematurity is necrotizing intercolitis, a condition almost never found in full-term babies. It develops some time after birth, often very suddenly. In this condition, believed to result from the underdeveloped state of the infant's digestive system, an infection takes hold in the small bowel which causes the mucosa to slough off, sometimes leading to necrosis and perforation.

Marcel was fed through a tube for the first week after his delivery. Oral feeding began on August 17.

On September 5, Marcel's abdomen distended and he began spitting up his food. The treatment team determined necrotizing intercolitis had set in. Antibiotics did not help. Exploratory surgery found that the small bowel was almost entirely dead, an inevitably fatal condition. Taken off life support, Marcel died.

In Dr. Ezzedeen's opinion, it was extremely unlikely that Marcel would have developed necrotizing intercolitis if born at term; Dr. Ezzedeen had treated over 100 cases and had never seen one in a full-term baby. He could not exclude Marcel's heart defect as a risk factor for the condition, but it was not the

cause. The medical community does not know why the condition is more severe in some infants than in others.

Dr. Gregory Reiber, a forensic pathologist, performed an autopsy on Marcel on September 6. He opined that death occurred due to complications of prematurity, with the additional complicating factor of a congenital heart defect. At 28 weeks, Marcel was very premature, almost extremely so; babies born that prematurely can develop malfunctions of the brain, lungs, intestines, liver, and kidneys.

In Dr. Reiber's opinion, Marcel's prematurity was the "proximate cause" of death, but it was also "a primary factor leading to the [necrotizing intercolitis]." This can be so because immature lungs deliver insufficient oxygen to the intestinal tract, and because oral feeding can lead to gastrointestinal difficulties. Marcel's inadequate lung development had caused respiratory diseases and brain hemorrhages before his death.

According to Dr. Reiber, if Marcel had been born at term with the same Down's syndrome and heart defect, he would have had only a 5- to 6-percent risk of mortality. However, the heart defect increased his risk for the complications associated with prematurity.

On August 10, Garvon White told Laura Bardman Murray, a social worker, that she and defendant had been in a violent relationship for a year; once he broke her arm while she was pregnant. On August 12, White told Murray defendant had beaten

her abdomen another time during the pregnancy but she had not reported it.

Thelma Cruz-Taylor, defendant's estranged wife and the mother of his children, testified that defendant had repeatedly slapped and struck her while she was pregnant. In 1998, after she had left him and taken the children, he came to her apartment, told her he would be happy only if she were dead, and choked her.

Additional facts appear below as relevant to particular issues.

DISCUSSION

I

Defendant contends he could not properly be convicted of murdering Marcel, "a human being," because "[t]he fatal act . . . occurred before Marcel was born." He asserts that the issue turns on whether a fetus is considered a human being in the eyes of the criminal law. He then concludes that under section 187, which distinguishes between the murder of a fetus and the murder of a human being, he could properly have been convicted, if at all, only of the former offense.[3] We disagree.

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[3] Section 187 provides as relevant:

"(a) Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.

"(b) This section shall not apply to any person who commits an act that results in the death of a fetus if [it is a lawful therapeutic abortion].

"(c) Subdivision (b) shall not be construed to prohibit the prosecution of any person under any other provision of law."

As we shall explain, defendant's first premise is flawed. In defining the offense in this case, the law looks to the instant of death, not to when defendant did the act that ultimately caused death. Because Marcel was a human being when he died, defendant's conviction for the murder of a human being was proper.

At common law, when a child was born alive but subsequently died due to injuries inflicted before birth on the mother, the crime was murder or manslaughter; if the child was born dead, there was no homicide. (1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 96, p. 712.) Section 187 did not modify that common law rule as to live-born babies. (*Id.* at pp. 712-713.)

If a fetus is born alive after an attack on the mother but subsequently dies, it is a human being at the time of death for purposes of the manslaughter statute. (§ 192; *People v. Dennis* (1998) 17 Cal.4th 468, 505-506.) Unlike section 187, section 192 does not cover the killing of a fetus. However, it would be illogical to conclude that once a fetus has been born it is a human being for purposes of manslaughter but not for purposes of murder. The only distinction between a manslaughter case and a murder case on such facts is whether the defendant's attack on the mother was spurred by malice aforethought toward the fetus. This distinction has no bearing on whether the victim is a human being within the meaning of section 187.

We conclude that if (1) a defendant, acting with malice aforethought toward the fetus in a woman's womb, assaults the

woman; (2) in consequence, the fetus must be delivered prematurely; and (3) the fetus is born alive but later dies of causes to which the prematurity contributed substantially, the defendant has murdered a human being. (§ 187, subd. (a); see *People v. Dennis, supra*, 17 Cal.4th 468, 505-506; 1 Witkin & Epstein, *supra*, § 96, pp. 712-713.)

Defendant asserts that such a construction of section 187 amounts to an unacceptable "relation back" theory of culpability. Defendant is mistaken. As we have shown, the law of manslaughter, as explained in *People v. Dennis, supra*, 17 Cal.4th 468, defines the defendant's crime by the victim's status as a human being at the time of the victim's death, even if the acts that proximately caused his death occurred before his birth. By analogy, so should the law of murder. Nothing is "relat[ed] back": the law simply takes the victim as it finds him.

Defendant relies on *Justus v. Atchison* (1977) 19 Cal.3d 564 (*Justus*) (disapproved on other grounds in *Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 171), which held that under California's wrongful death statute, triggered by the death of a "person" (Code Civ. Proc., former § 377; see now § 377.60; Stats. 1992, ch. 178, §§ 19-20), a cause of action would not lie for the death of a stillborn fetus. His reliance is misplaced.

In *Justus, supra,* 19 Cal.3d 564, the court found that the Legislature had not expressly incorporated the definition of "an existing person" in Civil Code former section 29 (repealed by Stats. 1993, ch. 19, § 2), which included a fetus, into the

wrongful death statute, and held that the Legislature had thus impliedly excluded fetuses from the statute's coverage. (*Justus, supra,* at pp. 578-579.) The court also noted that the Legislature had "specially identified the object of its concern," either by express language or the incorporation of Civil Code former section 29, "in the limited instances in which the Legislature has extended the protection of the criminal law to the unborn child." (*Justus, supra,* 19 Cal.3d at p. 579.)

Defendant asserts *Justus, supra,* 19 Cal.3d 564, in effect created a rule that criminal liability based on harm to a live child from "a prenatal act" can stem only from a statute analogous to Civil Code former section 29 or expressly incorporating it. He is wrong for several reasons.

First, the sole issue in *Justus, supra,* 19 Cal.3d 564, was how to construe the wrongful death statute; thus the court's discussion of criminal law is dictum. Second, the court grounded its holding on the premise that the wrongful death cause of action, as a pure creature of statute, must be limited to the precise terms used by the Legislature (*id.* at p. 575); by contrast, section 187 codifies the common law of murder and has not changed it in any material way. (See 1 Witkin & Epstein, *supra*, § 96, pp. 712-713.) Third, defendant has not shown that "human being" as used in section 187 is synonymous with "person" as used in the civil law, whether in the wrongful death statute (Code Civ. Proc., § 377.60) or in Civil Code former section 29. Lastly, as we have explained, the victim in this case was not an "unborn child" as the term is used in *Justus, supra*.

Defendant also cites *Reyes v. Superior Court* (1977) 75 Cal.App.3d 214 at pages 218 through 219 (*Reyes*), which held in reliance on *Justus, supra,* 19 Cal.3d 564, that the alleged mistreatment of a fetus will not support a criminal prosecution for child endangerment (§ 273a). However, *Reyes* is distinguishable because the alleged criminal conduct constituting endangerment (the mother's use of heroin while pregnant), including the resulting harm (fetal addiction), was complete before the fetuses were born. (*Reyes, supra,* 75 Cal.App.3d at p. 216.)

In conclusion, defendant has failed to show that he could not be convicted for the murder of a human being on the facts in this case.

II

Building on his previous argument, defendant contends the trial court erred by instructing the jury that implied malice is a killing resulting from an intentional act, the natural consequences of which are dangerous to *human* life. In defendant's view, the trial court should have instructed sua sponte that proof of implied malice required a showing that defendant assaulted the mother in conscious disregard of *fetal* life. Having rejected defendant's previous argument, we necessarily reject this one.

III

Defendant contends there was insufficient evidence to support his conviction for murder because the People failed to prove defendant's conduct caused Marcel's death, which occurred

due to "natural causes . . . nearly one month after he was born." We conclude there is sufficient evidence that defendant's conduct caused Marcel's death.

We review insufficient-evidence contentions in criminal cases by viewing the evidence in the light most favorable to the judgment and deciding whether there is substantial evidence from which a reasonable trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. (*People v. Staten* (2000) 24 Cal.4th 434, 460; *People v. Johnson* (1980) 26 Cal.3d 557, 576.) If the answer is affirmative, the possibility that the trier of fact might reasonably have reached a different conclusion does not warrant reversal. (*People v. Bean* (1988) 46 Cal.3d 919, 932-933.)

"The criminal law . . . is clear that for liability to be found, the cause of the harm not only must be direct, but also not so remote as to fail to constitute the natural and probable consequence of the defendant's act." (*People v. Roberts* (1992) 2 Cal.4th 271, 319.) In determining whether a defendant's acts were the proximate cause of the death of a human being, we ask whether the evidence sufficed to permit the jury to conclude that the death was the natural and probable consequence of defendant's act. (*Id.* at p. 321.) As we shall explain, the evidence adduced at the trial of this case satisfies this test.

Defendant points to the evidence that medical science does not know for certain what causes necrotizing intercolitis, that the condition can occur in full-term babies, that it is less likely to occur fatally in babies born at 28 weeks than in those

born two or three weeks younger, and that Marcel's Down-syndrome-related heart defect carried a measurable risk of mortality even if he had been delivered at term.

Although defendant does not fully spell it out, we take his argument to be that Marcel's preexisting heart defect could have been the sole cause of death because it rendered him vulnerable to necrotizing intercolitis regardless of the circumstances of his birth, and that the prosecution did not prove the contrary beyond a reasonable doubt. Defendant cannot hope to prevail merely by arguing the heart defect was a contributing cause of death: even if true, this claim would not relieve him of responsibility for his own acts. (See *People v. Phillips* (1966) 64 Cal.2d 574, 577-579; *People v. Scola* (1976) 56 Cal.App.3d 723, 726.)

Contrary to defendant's position, the jury here could reasonably have concluded that Marcel's death was the natural and probable consequence of defendant's punching Garvon White. It was undisputed that defendant's assault on White forced the immediate and grossly premature delivery of Marcel. It was also undisputed that from the time of his birth to the time of his death, Marcel suffered from debilitating conditions caused by his prematurity and which would not have existed but for the prematurity. The immediate cause of Marcel's death, necrotizing intercolitis, is almost never seen except in premature babies. Dr. Ezzedeen, the main prosecution expert on that point, had

seen over 100 cases, but not one in a baby born at full-term.[4] Dr. Ezzedeen and Dr. Reiber explained how the many forms of vulnerability a premature infant experiences can expose him to necrotizing intercolitis. Dr. Reiber also testified to other forms of injury Marcel had incurred before his death arising out of those same vulnerabilities. Altogether, this evidence constituted an overwhelming showing that defendant's assault on White was the proximate cause of Marcel's death.

On the other hand, there was no substantial evidence to support the claim that Marcel's heart defect would have caused his death if he had not been born almost two months prematurely. Although there was evidence that it would have increased his risk of mortality by a small percentage if he had been born at full term, there was no evidence that it would have increased his risk of developing necrotizing intercolitis under those circumstances. There was only the skimpiest evidence that full-term babies can develop that condition (an undeveloped allusion to the medical literature, with no showing as to probability or frequency). And there was no evidence whatever that any full-term baby has ever died of that condition.

But even if the jury could have concluded that Marcel's preexisting heart defect contributed to his death, that would

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[4] Defendant cites the testimony of Dr. Reiber, the forensic pathologist, that the condition can happen in full-term infants. Dr. Reiber gave no evidence as to the probability or frequency of such an occurrence, however. Thus his testimony did not contradict that of Dr. Ezzedeen.

not have relieved defendant of his responsibility for the death. As the courts have made clear, a defendant whose infliction of physical injury upon another is a cause of that person's death is guilty of unlawful homicide even if the injury was not the only cause of death, and even if the victim was in a weakened state due to a preexisting condition. (*People v. Phillips*, *supra*, 64 Cal.2d at pp. 577-579; *People v. Stamp* (1969) 2 Cal.App.3d 203, 207-209; see CALJIC No. 8.58.) Although the first victim of physical injury from defendant's act was Garvon White, Marcel was the ultimate victim of that injury, in that the premature delivery it forced rendered him vulnerable to the condition that killed him.

Substantial evidence supports the jury's conclusion that defendant caused the death of Marcel Taylor.

IV

Defendant contends the trial court erroneously instructed on causation.

The trial court gave the following instructions on causation:

"[CALJIC No.] 8.55[:] To constitute murder or manslaughter there must be, in addition to the death of a human being, an unlawful act which was a cause of that death.

"[CALJIC No.] 8.56[:] It is not a defense to a criminal charge that the deceased or some other person was guilty of negligence, which was a contributory cause of the death involved in this case.

"[CALJIC No.] 8.57[:] Where the original injury is a cause of the death, the fact that the immediate cause of death was the medical or surgical treatment administered or that the treatment was a factor contributing to the cause of death will not relieve the person who inflicted the original injury from responsibility.

"Where, however, the original injury is not a cause of the death and the death was caused by medical or surgical treatment or some other cause, then the defendant is not guilty of an unlawful homicide."

Defendant does not criticize these instructions. Rather, he argues that the trial court should have instructed with CALJIC No. 3.40 so as to further define proximate cause.[5] Defendant's argument is therefore that each proximate cause instruction actually given was incomplete because it did not adequately define proximate cause. However, as defendant acknowledges, CALJIC No. 3.40 was originally requested but was withdrawn. The record does not reveal which party requested it, or why it was withdrawn. A party contending that an instruction that is otherwise correct is incomplete has a duty to object to the instructions given or request a clarifying instruction in the trial court; otherwise, the claim is forfeited on appeal.

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[5] CALJIC No. 3.40 provides in part: "The criminal law has its own particular way of defining cause. A cause of [death] is an act . . . that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act . . . the [death,] and without which the [death] would not occur."

(*People v. Valdez* (2004) 32 Cal.4th 73, 113; *People v. Hart* (1999) 20 Cal.4th 546, 622.) Because the record fails to show that defendant objected to the causation instructions given or requested a clarifying instruction, his claim of instructional error has been forfeited. (*People v. Valdez, supra,* 32 Cal.4th at p. 113.)

The trial court also instructed the jury that the People had the burden of proving all elements of the charged offenses beyond a reasonable doubt and the defendant had a right to rely on the People's failure to meet that burden. Defendant asserts, however, the trial court should also have instructed sua sponte specifically on the People's burden of proving proximate cause, and its failure to do so cannot be harmless beyond a reasonable doubt on these facts.

Once again, if defendant wanted a more specific instruction on the burden of proof than the correct general one given by the trial court, he had a duty to request it, and having failed to do so, he has forfeited his claim of instructional error on appeal. (*People v. Valdez, supra,* 32 Cal.4th 73, 113; *People v. Hart, supra*, 20 Cal.4th 546, 622.)

V

Defendant, who is African-American, contends the trial court erred reversibly under *Wheeler, supra,* 22 Cal.3d 258, by accepting the prosecutor's explanations for challenging one of two African-American prospective jurors. We conclude the claim of error is forfeited.

Background

The prosecutor exercised peremptory challenges to prospective jurors S. H. and R. W. Defendant raises a claim of *Wheeler* error only as to S. H.

Defense counsel stated: "I would like to make a *Wheeler* motion with regards to [S. H]. I do not believe that there is anything in his questionnaire or his answers that reflect [*sic*] a rational basis for removing him from this jury except for his race.[6]

"[S. H.] is . . . the only African-American or black male in the whole panel and the only African-American remaining in the whole panel. Anyone else was released for cause or because of a hardship.

"[S. H.] indicated he works for the government. He's an immigration and naturalization worker. He has been a member of the army. He's been in combat. He has served his country.

"His answers in his questionnaire indicate that he could follow all the law that is applicable to this case. Did not indicate anything but more of an affinity for the prosecution than the defense.

"He did state he has a degree in theology, which he has not used except in his daily life, accept [*sic*] as to treat others fairly, and sometimes teaches Bible study or classes in his church. But he has not become a minister himself, nor did he

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6 S. H.'s questionnaire was not retained for the record after his dismissal.

indicate that any religious belief would affect his ability to follow the law in this case or in any criminal case.

"He indicated he understood and wanted to uphold those laws and has made a career of doing that. Working in the army and in his current position, he worked [in] human resources. It sounds like a person who [e]nsured that within the army, they were following the laws with regards to civil rights and lack of discrimination on any basis.

"And I do not feel there is any justification for his removal from this jury panel."

The trial court found defendant had made a prima facie case under *Wheeler, supra,* 22 Cal.3d 258, and asked the prosecutor to explain her reasons for the challenge. The prosecutor answered:

"Your Honor, I reviewed all the questionnaires from the jurors that we received before we actually saw them come into the courtroom. And I . . . rated whether or not I would potentially keep or challenge the prospective juror just solely based on the questionnaire. And I have notes, in case the Court would like to view them.

"[B]efore [S. H.] ever made it into the box, my notes indicate that I had a concern because he had a bachelor[']s degree in theology.

"The concern to the People is that . . . it's always been my concern that people who devote that much time to their religion tend to be more sympathetic and want to be more forgiving and would be more emotional in deciding the case.

They would tend to want to forgive the defendant as opposed to being objective and looking at the facts.

"I also had a concern because I'd like the record to reflect that there is a Bible sitting in front of the defendant. So not only did I have a juror who had spent four years studying theology and religion, but I also have a defendant who has shown symbolically to this jury that he is religious. So, in that respect, I was concerned that [S. H.] would feel, even given his background in theology, even more sympathy for the defendant."

Defense counsel rebutted: "[Defendant]'s Bible just says it's the Good News Bible. It doesn't refer to any specific religion. We don't know what religious beliefs [S. H.] has. I never questioned him about them. And, once again, he showed no indication that he was going to be overly emotional or sympathetic.

"This is a man who has been in combat in Vietnam and has done two tours of duty and did not appear to have any of the traits that [the prosecutor] is indicating she was weary [*sic*] of."

The trial court denied the *Wheeler* motion, finding that the prosecutor's challenge did not appear to be based on race but on "other factors which are credible and which reflect tactical considerations which are permissible under the law."

Analysis

Defendant asserts: "The prosecutor used one form of group bias (religion) when challenged to explain another (race)." We

agree with the People that defendant may not raise this argument now because he did not do so in the trial court.

Although both counsel discussed S. H.'s religion, defense counsel did not argue that the prosecutor's stated grounds for challenging S. H. betrayed a bias against religion or religious believers as a group. A *Wheeler, supra,* 22 Cal.3d 258, claim of error that depends on reasoning not raised below is forfeited. (*People v. Howard* (1992) 1 Cal.4th 1132, 1157; *People v. Hayes* (1990) 52 Cal.3d 577, 605.)

At oral argument, defendant asserted that he did not need to claim below that the prosecutor was improperly discriminating against religious believers in order to preserve the issue for appeal. According to defendant, after he had stated a specific ground for his *Wheeler* claim in making a prima facie case, and the prosecutor had rebutted it with a nonracial but facially questionable rationale for excluding the juror, the trial court had a duty to address its permissibility under *Wheeler, supra,* 22 Cal.3d 258, sua sponte even if defendant failed to make any focused *Wheeler* argument against it. We reject this contention.

Whether the exclusion of jurors based on religion per se raises a cognizable *Wheeler* claim is at best ambiguous in current law. Defendant does not cite any case law that says so expressly and unequivocally. He relies on *People v. Martin* (1998) 64 Cal.App.4th 378, in which the court construed dictum in *Wheeler, supra,* 22 Cal.3d 258, as leaving open the possibility of extending its rule to religious discrimination but did not find such discrimination in the case at bench

because the challenged juror had revealed that his specific beliefs would preclude jury service. (*People v. Martin, supra,* 64 Cal.App.4th at pp. 384-385; see also *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1281, fn. 9.) Defendant also cites *People v. Allen* (1989) 212 Cal.App.3d 306 at page 312, in which the court referred in a footnote to dictum from *People v. Johnson* (1989) 47 Cal.3d 1194 at page 1215, stating summarily that religious bias is a cognizable form of group bias. (*People v. Allen, supra*, 212 Cal.App.3d at p. 312, fn. 4; see *People v. Garcia, supra,* 77 Cal.App.4th 1269, 1281, fn. 9 [explaining why statement from *People v. Johnson, supra*, 47 Cal.3d 1194 is dictum].)[7]

Given the vagueness of the current law on this issue, it would be unfair to impose a duty on this trial court to have inquired sua sponte, without being prompted by any argument from the defendant, whether the prosecutor had improperly excluded

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[7] In *People v. Cash* (2002) 28 Cal.4th 703, not cited by defendant, our Supreme Court recently commented on this issue without coming any closer to resolving it. The court first stated: "Although this court has described the protections against group exclusion as including religious affiliation, the United States Supreme Court has only applied *Batson* [*v. Kentucky* (1986) 476 U.S. 79 [90 L.Ed.2d 69]] to forbid group exclusion based on race or gender. [Citations.]" (*People v. Cash, supra*, 28 Cal.4th at p. 724 (not citing any California Supreme Court case).) The court then found that the prosecutor's stated reasons for excluding a juror raised as a Jehovah's Witness, which included both religious and nonreligious grounds, were facially plausible and sufficient to rebut the defendant's claim of racial discrimination (which, as in our case, was the only one raised by the defendant). (*Id.* at pp. 724-726.)

jurors based on religious bias. Thus, as we have already said, defendant's failure to raise this challenge explicitly in the trial court forfeits it on appeal. (*People v. Howard, supra*, 1 Cal.4th 1132, 1157; *People v. Hayes, supra*, 52 Cal.3d 577, 605.)

VI

Defendant contends the trial court erred by failing to instruct *sua sponte* on attempted murder of a fetus as a lesser included offense to murder. He reasons that if his assault on Garvon White was meant to kill the fetus, that intent was thwarted by the fetus's subsequent delivery, rendering his crime one of attempt only. On this reasoning, substantial evidence supported a conviction for attempted murder of a fetus and the trial court therefore should have instructed on that "lesser included offense" sua sponte. We disagree because attempted murder *of a fetus* is not a lesser included offense to murder *of a human being*, the offense charged in the information on which the case went to trial.

"California law requires a trial court, *sua sponte*, to instruct fully on all lesser necessarily included offenses supported by the evidence." (*People v. Breverman* (1998) 19 Cal.4th 142, 148-149, italics added.)

An offense is a lesser included offense to a charged offense if the former is necessarily included in the latter. There are two tests to determine whether this is so: (1) if all of the elements of the lesser offense are included in the elements of the greater offense, or (2) if the allegations of the pleading describe the charged offense so that it necessarily

includes all the elements of the lesser offense. (*People v. Lopez* (1998) 19 Cal.4th 282, 288-289.)

Here, the amended complaint pleaded count 1 as "murder [of] a human fetus." However, in a subsequent version of the amended complaint which was deemed an information, and which constituted the operative pleading in this case, the count was amended to read "murder [of] a human being."

Under the elements test, "if a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former. [Citations.]" (*People v. Lopez, supra,* 19 Cal.4th 282, 288.) The crime of murder of a human being does not include as an element the murder of a fetus, because human beings are murdered all the time without any involvement of a fetus. Thus, applying the elements test, the attempted murder of a fetus is not a lesser included offense to murder of a human being. (Cf. *Id.* at pp. 288-289.)

Nor did the operative pleading make murder of a fetus a lesser included offense. Because defendant was ultimately charged specifically with murder of a human being, without mention of a fetus, attempted murder of a fetus was not a lesser included offense under the pleadings test. Accordingly, defendant was not entitled to instruction on attempted murder of a fetus as a lesser included offense. The trial court did not err by failing to give such an instruction *sua sponte*.

In his reply brief, defendant asserts for the first time that if attempted murder of a fetus was not a lesser included

offense under the operative pleading, then he was entitled to an instruction on attempted murder *of a human being* as a lesser included offense. It is improper to raise new contentions in the reply brief. (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8.)[8] Therefore, this contention is forfeited.

In any event, defendant does not cite any authority holding that attempted murder is a lesser included offense to murder, but merely asserts this proposition. A legal proposition asserted without apposite authority necessarily fails. (*Amato v. Mercury Casualty Co.* (1993) 18 Cal.App.4th 1784, 1794.)

But even assuming that attempted murder of a human being was a lesser included offense to murder as pleaded here, and even assuming an instruction on attempted murder of a human being should have been given, any error in failing so to instruct was harmless: in light of the entire cause, including the evidence, it is not reasonably probable that defendant would have obtained a more favorable outcome had the instruction been given. (*People v. Breverman, supra,* 19 Cal.4th at p. 178.) His

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[8] Moreover, defendant's method of raising the argument is confusing. Below an argument heading which speaks only of attempted murder of a fetus, he makes his new contention under the subheading "Attempted Murder Is A Lesser Included Offense To Murder." This does not comply with California Rules of Court, rule 14(a)(1)(B), which requires an appellate brief to "state each point under a separate heading or subheading summarizing the point": defendant's subheading is not logically related to his overall heading and does not "summariz[e] the point" that instruction on attempted murder of a human being as a lesser included offense to murder was required.

conduct was brutal, and the words he spoke as he repeatedly punched Garvon White in the stomach--"I don't want this bitch to have my baby"--made clear his intent to kill the fetus she was carrying. On these facts a reasonable jury could not have found that his crime was merely one of attempt.

VII

Defendant contends the trial court erred by instructing the jury pursuant to CALJIC No. 8.51: "If a person causes another's death while committing a felony which is dangerous to human life, the crime is murder. If a person causes another's death while committing a felony that is not inherently dangerous, but which is dangerous to human life under the circumstances of its commission, the crime is involuntary manslaughter." According to defendant, this instruction, which differentiates between second degree felony murder and involuntary manslaughter, should not be given where felony murder liability is not at issue because it erroneously permits the jury to find guilt based on a felony murder theory rather than a finding of malice. Defendant further contends that the trial court's error must be reviewed under the *Chapman*[9] standard because it withdrew the issue of malice, an essential element of murder, from the jury's consideration, or because it set up a conflict with other instructions going to that issue. (See *People v. Maurer* (1995)

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[9] *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705] (*Chapman*).

32 Cal.App.4th 1121, 1128.) Defendant has not shown grounds for reversal on this point.

CALJIC No. 8.51 should not be given in a second degree felony murder prosecution in which the felony has "merge[d]" with the homicide. (See *People v. Hansen* (1994) 9 Cal.4th 300, 316.) However, as we shall explain, this case was not prosecuted as a felony murder case, and the jury could not reasonably have believed that it could convict defendant on a felony murder theory. Thus, even assuming the instruction should not have been given, the error is harmless under the *Chapman* standard.

The information alleged as to count 1 that defendant committed murder, acting with malice aforethought. The jury was correctly instructed on the definitions of murder and malice aforethought (CALJIC Nos. 8.10, 8.11); the various forms of unlawful homicide, *not* including felony murder (CALJIC Nos. 8.20, 8.30, 8.31, 8.37, 8.40, 8.42, 8.43, 8.44, 8.45, 8.46, 8.50); and the concurrence of act and specific intent as to count 1 (CALJIC No. 3.11).

Moreover, the jury heard the testimony of Garvon White and the numerous witnesses to whom she had told her story before trial that defendant said, as he punched her multiple times in the stomach, that he did not want the baby and did not want White to have the baby, and/or that he wanted to kill the baby--evidence fitting only a theory of malice aforethought. The prosecutor stressed this testimony in closing argument:

"We submit to you, ladies and gentlemen, that the most accurate statements from Garvon White occurred before she began her attempt to protect him. So what statements are those? Those are the statements to the responding officer, Officer Benton, who she tells, he hit me six times in the stomach, said he didn't want me to have his baby. She told the paramedic that he hit her multiple times in the stomach. . . . To Dr. Wong, again, she said multiple times she was hit to the stomach. To Alisa Kistler, that she was hit six times to the stomach. And to the social worker, Laura Bardman Murray, [to] who[m] she explained he said he wanted to kill my baby. [¶] . . . [¶] . . . She told Detective Rankin the defendant hit her six times in the stomach while she was on the floor trying to protect the baby. He yelled as he hit her, I don't want the baby, don't want the, quote, 'bitch,' to have this baby."

The prosecutor also clearly explained the difference between murder and manslaughter--the presence or absence of malice aforethought--and the reasons why defendant could not properly be found to have committed the lesser of these offenses: the number and force of the blows he struck and the words he spoke as he struck them, showing an intent to kill or a conscious disregard for life plus an action naturally dangerous to the life of the ultimate victim, combined with a lack of any legally sufficient provocation and heat of passion or unreasonable self-defense to reduce the offense to manslaughter. The prosecutor never argued for second degree murder on a felony murder theory.

Furthermore, there was no evidence that the assault took place in any way other than that which White described before and during trial: a targeted attack on the fetus, accompanied by outbursts of murderous rage toward it (along with the "bitch" who was carrying it). The jury could not reasonably have found that defendant merely beat White without intending the fatal result that ultimately occurred.

For all these reasons, even if the trial court should not have given CALJIC No. 8.51, there is no reasonable possibility defendant would have obtained a better outcome without that instruction. Therefore, any error was harmless beyond a reasonable doubt. (*Chapman, supra,* 386 U.S. 18, 24 [17 L.Ed.2d at pp. 710-711].)

VIII

Defendant contends the jury's finding as to count 2 that he terminated White's pregnancy is not supported by the evidence, because as a matter of law "termination of . . . pregnancy" as used in section 12022.9, former subdivision (a), can only mean a miscarriage or an abortion.[10] We conclude he has not supported this contention.

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[10] Section 12022.9, former subdivision (a), in effect at the time of trial, provided: "Any person who, during the commission or attempted commission of a felony, knows or reasonably should know that the victim is pregnant, and who, with intent to inflict injury, and without the consent of the woman, personally inflicts injury upon a pregnant woman that results in the termination of the pregnancy shall, in addition and consecutive to the punishment prescribed by the felony or attempted felony of which the person has been convicted, be punished by an

"'"We begin with the fundamental rule that our primary task in construing a statute is to determine the Legislature's intent. [Citation.]" [Citation.] "'The court turns first to the words themselves for the answer.' [Citations.]" [Citation.] When the statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it. [Citation.] The plain language of the statute establishes what was intended by the Legislature. [Citation.] [Citation.]"'" (*People v. Statum* (2002) 28 Cal.4th 682, 689-690.)

The plain meaning of former section 12022.9 does not limit its application to cases of miscarriage or abortion. Moreover, defendant cites no authority so limiting the term "termination of pregnancy" in section 12022.9. Instead, he offers definitions of the term in unrelated statutes and case law, plus what he calls "an examination of probable legislative intent" devoid of any actual indicia of such intent. He also asserts that his preferred definition accords with the clear and unambiguous meaning of the term in ordinary usage, but again fails to provide any relevant authority for this claim--not even

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additional term of five years in the state prison. The additional term provided in this subdivision shall not be imposed unless the fact of that injury is charged in the accusatory pleading and admitted or found to be true by the trier of fact. [¶] Nothing in this subdivision shall be construed as affecting the applicability of subdivision (a) of Section 187 of the Penal Code."

The statute was later amended to delete former subdivision (b) and renumbered without subdivisions, but not materially changed. (Stats. 2002, ch. 126, § 7.)

a dictionary definition. Legal contentions unsupported by apposite authority are waived. (*Amato v. Mercury Casualty Co.*, *supra,* 18 Cal.App.4th 1784, 1794.)

In *Dennis, supra,* 17 Cal.4th 468, the only published case thus far to address section 12022.9, the court noted: "As an enhancement, section 12022.9 does not represent an alternative to a charge of fetal murder in violation of section 187. Instead, it imposes an additional punishment for committing, or attempting to commit, a felony in a manner that intentionally injures a pregnant woman and results in termination of her pregnancy. *The enhancement relates to the particular injury a defendant inflicts on a woman in committing the substantive crime*." (*Dennis, supra*, 17 Cal.4th at p. 501; italics added.) Although *Dennis* does not discuss the precise issue before us now, its reasoning is instructive.

Dennis, supra, 17 Cal.4th 468, teaches that the point of the enhancement is to punish the defendant for injuring a woman in a particular manner with a particular result, not for the particular harm that comes to the fetus she is carrying. Given this logic, the enhancement is properly imposed when the pregnancy "terminates"--i.e., ends--in any manner as a result of the defendant's intentional felonious act. If only a miscarriage or an abortion could constitute the "termination" of a pregnancy under this statute, the Legislature could have so specified. Here, defendant's assault on Garvon White ended her ongoing pregnancy two months prematurely by forcing the immediate delivery of her fetus through a C-section. Under the

logic of *Dennis*, and applying the plain language of the statute, we conclude that the enhancement was supported by the evidence.

IX

Defendant contends the prosecutor committed misconduct by eliciting damaging testimony from a witness in violation of a court order and the measures the trial court took to remedy the damage were insufficient. We find no prejudice to defendant from what occurred.

Background

The prosecutor called Deputy District Attorney Chris Ore, who had interviewed Garvon White several times before trial at a time when the case was tentatively assigned to him, to testify about those interviews. Before he testified, the trial court and counsel had an in-chambers discussion about the permissible scope of his testimony. Defense counsel expressed concern that Ore might testify White changed her story in defendant's favor after meeting with defendant's legal team. The prosecutor said she would not ask any questions that might elicit such testimony. The trial court agreed it would be inappropriate to ask such questions.

The topic of White's alleged meetings with the defense did not come up in Ore's direct or cross-examination testimony. However, on the prosecutor's redirect, the following sequence occurred:

"Q And did [White] tell you anything about whether she had ever done anything to [defendant] in the past?

"A Soon after the death of the baby, *in one of our meetings, she had met with, I believe,* [*defendant*] *or the defense* and began talking about things that she had done, aggressive things." (Italics added.)

Defense counsel did not object. However, at the next court session, counsel moved for a mistrial. Counsel explained she had not objected because she was surprised by Ore's remarks and an objection would have risked calling further attention to them. However, on reflection, she had concluded the damage from Ore's violation of the court's order was irreparable because the trial was now tainted with the notion that defendant, through his defense team, had sought to tamper with White's testimony.

The trial court found that Ore's testimony violated the court's order, but the prosecutor had not elicited that testimony: her question did not call for Ore to talk about White's meetings with defendant or "the defense." After hearing further argument, the court denied the mistrial motion, but ruled in addition: (1) The part of Ore's testimony reading "in one of our meetings, she had met with, I believe, [defendant] or the defense" would be stricken. (2) The jury would be instructed that the court reporter's notes (not containing the stricken remarks) are the record of the proceedings and would prevail over anyone else's notes or recollection. (3) After the trial court, counsel, and Ore had met again in chambers to get everyone on the same page, the prosecutor would recall him to the stand to clear up the subject.

At the second in-chambers conference, it became clear that Ore (1) wrongly believed his testimony was within the court's guidelines and (2) had no direct evidence of any meetings between White and defendant or his legal team. Counsel entered into the following stipulations, which were then read to the jury: (1) "There is no evidence the defendant told Garvon White what to say or how to testify." (2) "[A]ny reference by Mr. Ore to a meeting between Ms. White and the defense refers to the October 17 interview with [the defense investigator] and [defense counsel]." Ore was not thereafter recalled to the stand.

Analysis

To begin with, we reject defendant's assertion that the prosecutor committed misconduct by encouraging the misconduct of the witness. It is misconduct for a prosecutor to use deceptive or reprehensible methods to persuade the court or the jury. (*People v. Hill* (1998) 17 Cal.4th 800, 819.) However, the trial court found the prosecutor had not done so, and we agree. Contrary to defendant's insinuation, there is nothing in this record to show that the prosecutor violated the court's order or knowingly elicited Ore's improper testimony. The record shows, rather, that after the court made its original order the prosecutor scrupulously avoided asking any questions which would have called for the kind of answer Ore gave. The question which produced that answer clearly did not call for it and the prosecutor could not have anticipated that Ore would give such

an answer. Ore's misconduct, which took everyone by surprise, cannot be imputed to the prosecutor.

Furthermore, defendant did not raise a timely objection and request for admonition, which is normally required to preserve a claim of misconduct for appeal. (*People v. Hill, supra,* 17 Cal.4th 800, 820.) Absent an explanation why such measures would not have cured the harm, counsel's next-day mistrial motion did not suffice to preserve the issue.

In addition, defendant fails to explain why counsels' stipulations as read to the jury were insufficient to cure any possible harm. The court properly instructed the jury it was required to take those stipulations as proven fact. Having been instructed that there was no evidence of any meetings between defendant and White, or any meeting between White and defense counsel other than one about which the jury had already heard evidence, the jury was presumably able to follow the court's instruction. (*People v. Adcox* (1988) 47 Cal.3d 207, 253.)

Defendant has shown no grounds for reversal on this issue.

X

In a supplemental brief, defendant contends the trial court erred in sentencing by denying him presentence custody credit pursuant to section 2933.2. The People concede the point. We accept the People's concession.

It is undisputed that defendant served 390 days in jail from the date of his arrest to the date of sentencing, and his arrest was for the offense that led to his conviction; therefore he was presumably entitled to 390 days of custody credit

pursuant to section 2900.5, subdivision (a), which provides in part: "In all felony and misdemeanor convictions, either by plea or by verdict, when the defendant has been in custody, including, but not limited to, any time spent in a jail . . . , all days of custody of the defendant . . . shall be credited upon his or her term of imprisonment."

The probation officer informed the trial court, however, that under section 2933.2 defendant's murder conviction made him ineligible for custody credit. The trial court stated in pronouncing judgment: "Pursuant to 2933.2 of the Penal Code, no credit for time served will be awarded at this time." The abstract of judgment does not show any award of custody credit.

Section 2933.2 provides in part:

"(a) Notwithstanding Section 2933.1 or any other law, any person who is convicted of murder, as defined in Section 187, *shall not accrue any credit, as specified in Section 2933*.

"[¶] . . . [¶]

"(c) Notwithstanding Section 4019 or any other provision of law, no credit *pursuant to Section 4019* may be earned against a period of confinement in, or commitment to, a county jail, industrial farm, or road camp, or a city jail, industrial farm, or road camp, following arrest for any person specified in subdivision (a)." (Italics added.)

Neither section 2933 nor section 4019 concerns custody credit for presentence jail time, however. Section 2933 addresses only worktime credit accrued in prison after

conviction.[11] Section 4019 addresses only worktime and conduct credit accrued between arrest and conviction, not custody

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[11] Section 2933 provides: "(a) It is the intent of the Legislature that persons convicted of a crime and sentenced to the state prison under Section 1170 serve the entire sentence imposed by the court, except for a reduction in the time served in the custody of the Director of Corrections for performance in work, training or education programs established by the Director of Corrections. Worktime credits shall apply for performance in work assignments and performance in elementary, high school, or vocational education programs. Enrollment in a two- or four-year college program leading to a degree shall result in the application of time credits equal to that provided in Section 2931. For every six months of full-time performance in a credit qualifying program, as designated by the director, a prisoner shall be awarded worktime credit reductions from his or her term of confinement of six months. A lesser amount of credit based on this ratio shall be awarded for any lesser period of continuous performance. Less than maximum credit should be awarded pursuant to regulations adopted by the director for prisoners not assigned to a full-time credit qualifying program. Every prisoner who refuses to accept a full-time credit qualifying assignment or who is denied the opportunity to earn worktime credits pursuant to subdivision (a) of Section 2932 shall be awarded no worktime credit reduction. Every prisoner who voluntarily accepts a half-time credit qualifying assignment in lieu of a full-time assignment shall be awarded worktime credit reductions from his or her term of confinement of three months for each six-month period of continued performance. Except as provided in subdivision (a) of Section 2932, every prisoner willing to participate in a full-time credit qualifying assignment but who is either not assigned to a full-time assignment or is assigned to a program for less than full time, shall receive no less credit than is provided under Section 2931. Under no circumstances shall any prisoner receive more than six months' credit reduction for any six-month period under this section.

"(b) Worktime credit is a privilege, not a right. Worktime credit must be earned and may be forfeited pursuant to the provisions of Section 2932. . . . Except as provided in subdivision (a) of Section 2932, every prisoner shall have a reasonable opportunity to participate in a full-time credit

qualifying assignment in a manner consistent with institutional security and available resources.

"(c) Under regulations adopted by the Department of Corrections, which shall require a period of not more than one year free of disciplinary infractions, worktime credit which has been previously forfeited may be restored by the director. The regulations shall provide for separate classifications of serious disciplinary infractions as they relate to restoration of credits, the time period required before forfeited credits or a portion thereof may be restored, and the percentage of forfeited credits that may be restored for these time periods. For credits forfeited for commission of a felony specified in paragraph (1) of subdivision (a) of Section 2932, the Department of Corrections may provide that up to 180 days of lost credit shall not be restored and up to 90 days of credit shall not be restored for a forfeiture resulting from conspiracy or attempts to commit one of those acts. No credits may be restored if they were forfeited for a serious disciplinary infraction in which the victim died or was permanently disabled. Upon application of the prisoner and following completion of the required time period free of disciplinary offenses, forfeited credits eligible for restoration under the regulations for disciplinary offenses other than serious disciplinary infractions punishable by a credit loss of more than 90 days shall be restored unless, at a hearing, it is found that the prisoner refused to accept or failed to perform in a credit qualifying assignment, or extraordinary circumstances are present that require that credits not be restored. 'Extraordinary circumstances' shall be defined in the regulations adopted by the director. However, in any case in which worktime credit was forfeited for a serious disciplinary infraction punishable by a credit loss of more than 90 days, restoration of credit shall be at the discretion of the director.

"The prisoner may appeal the finding through the Department of Corrections review procedure, which shall include a review by an individual independent of the institution who has supervisorial authority over the institution.

"(d) The provisions of subdivision (c) shall also apply in cases of credit forfeited under Section 2931 for offenses and serious disciplinary infractions occurring on or after January 1, 1983."

credit. (§ 4019, subds. (b), (c).)[12] Therefore defendant was entitled to presentence custody credit pursuant to section 2900.5, and the trial court erred by denying defendant custody credit in reliance on section 2933.2. (See *People v. McNamee* (2002) 96 Cal.App.4th 66, 74.)

A sentence that fails to award legally mandated custody credit is unauthorized and may be corrected whenever discovered. (*People v. Acosta* (1996) 48 Cal.App.4th 411, 428, fn. 8.) We shall award defendant 390 days of presentence custody credit and shall direct the trial court to prepare a corrected abstract of judgment showing this award.

DISPOSITION

The judgment is affirmed. Defendant is awarded 390 days of presentence custody credit (Pen. Code, § 2900.5). The trial court is directed to prepare a corrected abstract of judgment

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[12] Section 4019, subdivisions (b) and (c) provide: "(b) Subject to the provisions of subdivision (d), for each six-day period in which a prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has refused to satisfactorily perform labor as assigned by the sheriff, chief of police, or superintendent of an industrial farm or road camp.

"(c) For each six-day period in which a prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has not satisfactorily complied with the reasonable rules and regulations established by the sheriff, chief of police, or superintendent of an industrial farm or road camp."

showing the award of custody credit and to forward a certified copy to the Department of Corrections.

SIMS, Acting P.J.

We concur:

RAYE, J.

HULL, J.